

August 27, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

)
) Docket Nos. 50-317-LR
) 50-318-LR
)

BALTIMORE GAS & ELECTRIC
COMPANY

(Calvert Cliffs Nuclear Plant,
Unit Nos. 1 and 2)

NRC STAFF'S RESPONSE TO
THE NATIONAL WHISTLEBLOWER CENTER'S
REQUEST FOR A HEARING AND PETITION TO INTERVENE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c) and the Atomic Safety and Licensing Board's Initial Prehearing Order of August 20, 1998, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "Petition to Intervene and Request for a Hearing of the National Whistleblower Center," dated August 7, 1998, (Petition). For the reasons set forth below, the Petition, unless appropriately amended, should be denied.

BACKGROUND

On April 10, 1998, the Baltimore Gas & Electric Company (BG&E or Applicant) submitted an application pursuant to 10 C.F.R. Part 54 to renew the operating licenses for the Calvert Cliffs Nuclear Power Plant (CCNPP), Units 1 and 2. On July 8, 1998, pursuant to 10 C.F.R. §§ 54.27 and 2.105, the Staff published a notice of opportunity for a hearing on the application. "Baltimore Gas & Electric Company, Calvert Cliffs Nuclear Power Plant Units 1 and 2; Notice of Opportunity for

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a Hearing Regarding Renewal of Facility Operating Licenses Nos. DPR-53 and DPR-69 for an Additional 20-Year Period,” (Notice) 63 Fed. Reg. 36,966 (1998). The Notice provided that by August 7, 1998:

any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the license renewals in accordance with the provisions of 10 CFR 2.714.

...

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters which may be considered pursuant to 10 CFR Parts 54 and 51. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the . . . factors [in 10 C.F.R. § 2.714(d)]. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene.

Id. (emphasis added).

On August 7, 1998, the National Whistleblower Center (Petitioner) filed its Petition. On August 19, 1998, the Commission issued an order referring the Petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board panel for assignment of an Atomic Safety and Licensing Board to preside over this proceeding. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Plant, Units Nos. 1 and 2), CLI-98-14, 48 NRC __, slip op. (Aug. 19, 1998). On August 19, 1998, the Chief Administrative Judge appointed this Licensing Board to preside over the proceeding. 63 Fed. Reg. __ (1998). The Board then issued an order which, *inter alia*, scheduled further filings regarding the Petition. “Memorandum and Order (Initial Prehearing Order)” dated August 20, 1998..

Pursuant to the Prehearing Order, the Staff hereby files its answer to the Petition. As discussed below, Petitioner fails to establish standing and does not identify any aspect of this

proceeding as to which Petitioner wishes to intervene. Therefore, the Petition, unless appropriately amended, should be denied.

DISCUSSION

A. Legal Requirements for Intervention.

The Commission's regulations provide that a petition to intervene, *inter alia*, "shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors set forth in [§ 2.714(d)(1)]." 10 C.F.R.

§ 2.714(a)(2). Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene or a request for hearing, the presiding officer or licensing board is to consider:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2).

In determining whether a petitioner has established the requisite interest, the Commission applies contemporaneous judicial concepts of standing. *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). In order to establish standing, a petitioner must show that the proposed action will cause injury-in-fact to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *Id.*

The alleged interest must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993) *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). A Petitioner must have a “real stake” in the outcome of the proceeding to establish injury-in-fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-8, *aff’d*, ALAB-549, 9 NRC 644 (1979).

To establish injury-in-fact, the petitioner must establish that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury-in-fact. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle*, CLI-93-16, 38 NRC at 32. A “generalized grievance” shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 333 (1983)(*TMI*), *citing Transnuclear, Inc.* (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 531 (1977).

That a petitioner lives within a specific distance from the plant has been found, in the past, to be sufficient alone to confer standing on that petitioner in proceedings on construction permits, operating licenses, or significant amendments thereto. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Such cases have involved construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. *Id.* Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific injury-in-fact. *Id.* at 329-30.

Even in amendment proceedings in which there were findings that licensing actions involved obvious potential for offsite consequences, thus presumptively establishing injury-in-fact through proximity, the Commission and licensing boards have nevertheless traced alleged concrete injuries to the requested actions in finding that petitioners have standing. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-95 (1993)(petitioner had standing based on proximity and claim that material withdrawal schedule was safety-related); *Vogtle*, CLI-93-16, 38 NRC at 35 (petitioner had an interest based on proximity, which was linked to the proposed license transfer amendment based on concern regarding “non-safety-conscious management”); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996)(proximity in conjunction with possible offsite consequences from a shield plug accident sufficient to establish standing); *but see Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 157 (1991) (proximity alone in the case of an operating license amendment proceeding can support standing to intervene).

While an argument can be made that a license renewal proceeding may be viewed as the functional equivalent of an operating license proceeding in that, like an initial operating license, a renewed operating license conveys the authority without which a facility cannot be operated, it differs in a way material to the issue of standing. In an initial licensing action, the Commission, for the first time, makes the findings of compliance and reasonable assurance needed to authorize operation. *See* 10 C.F.R. § 50.57(a). In a renewal action, on the other hand, fundamental operating parameters and associated safety findings are unaffected and are unchanged, and, by virtue of the rulemaking action associated with the promulgation of 10 C.F.R. Part 54, are beyond the scope of the proceeding save

to the very narrow extent that they may be affected by aging-management considerations. *See* 10 C.F.R. § 54.21. The Commission has determined that, except for age-related matters, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation so that operation during the license renewal period will not endanger the public health and safety and would not be inimical to the common defense and security. *See* "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,463 (1995); "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,950 (1991). In relation to the matter of standing, then, it is wholly appropriate to inquire beyond the mere assertion of geographic proximity alone, to assess just what discernable injury there might be and how it might be redressed by adjudication of the matter.

An organization may establish standing either by demonstrating an injury to its organizational interests or through one or more of its individual members who have demonstrated standing. *See Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). The interests of members which a group seeks to represent and which confer standing upon the group must be "germane to the organization's purpose." *South Texas*, LBP-79-10, 9 NRC at 447 citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

B. Petitioner has not Established Standing

Petitioner does not attempt to establish organizational standing. The Petition does not state Petitioner's organizational purpose, nor does it set forth any injury-in-fact to its organizational interests. Rather, Petitioner seeks standing based on its representation of the Rev. L. William Yolton, a corporate officer of Petitioner and member of its Board of Directors, and Ms. M. Joyce Claro, an

employee and corporate officer of Petitioner. Petition at 2-3. Accordingly, Petitioner must show that one of these individuals has established standing to intervene.

1. Individuals' Interests have not been Shown Germane to Organizational Interests

As stated above, the interests of those an organization seeks to represent must be germane to the organization's purpose. The Petition does not state the organization's purpose, nor, as discussed below, does it set forth with particularity the interests of the two individuals it seeks to represent. Accordingly, Petitioner has not established standing based on its representation of these two individuals.

2. Petitioner has Failed to Allege an Injury in Fact Sufficient to Support Standing

Petitioner asserts that both Rev. Yolton and Ms. Claro own property and reside within 50 miles of CCNPP. Petition at 2-3. The Petition does not make any attempt to trace these individuals' interests to the requested action. As set forth above, proximity should only be considered as a factor in determining standing, and should be accorded little weight here because the Petition does not even specify the precise (or approximate) distances between these individuals' homes and CCNPP. Accordingly, Petitioner is not entitled to standing on the basis of proximity.

The Petition does not identify a particular, concrete injury sufficient to establish standing. With respect to both Rev. Yolton and Ms. Claro, the Petition states that the "health, safety, property rights and personal finances [of each] could be affected by the NRC granting BG&E's application for license renewal of 20 years if the plant cannot be safely operated for the full 20 year term of the renewal." Petition at 2-3. This asserted injury is unparticularized and shared in substantially equal measure by all or a large class of citizens. Accordingly, under, *TMI* and *Transnuclear*, these assertions should be viewed as a generalized grievance not sufficient to support standing. In addition,

the Petition makes no attempt to explain, in the context of license renewal under Part 54, how granting the application might cause any injury to Rev. Yolton's or Ms. Claro's safety, property rights or personal finances.

The Petition alleges that each of these individuals "lives, works, recreates and travels in the environs of Calvert Cliffs Units 1 and 2." *Id.* The Petition makes no attempt to explain how they might be injured by the proposed action with respect to these activities, except as follows. The Petition alleges that both of these individuals eat food "produced in an area that would be adversely affected by normal and accidental releases of radioactive materials from the operation of Calvert Cliffs." *Id.* Similar allegations have been held to be too remote and generalized to provide a basis for standing to intervene. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1449 (1982); *see Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 (1985).

Petitioner has failed to identify Rev. Yolton's and Ms. Claro's property interests (other than their homes) or the distance of their property from CCNPP; failed to describe their "personal finances"; failed to identify the precise locations where they work, recreate, and travel; and failed to show how the renewal application could have any possible effect upon their health, safety, property, or financial interests. Since Petitioner has not identified any aspects of the proceeding with respect to which it wishes to intervene, the Board cannot gain any further insight into the petitioner's injury. Therefore, Petitioner has not demonstrated an injury-in-fact to provide a basis for standing. Having not identified a concrete injury, the Petitioners cannot, *per force*, trace any injury to the proposed

renewal, nor show how any injury might be redressed by a favorable decision. Accordingly, the Petition should be denied.¹

C. The Petition Does not Identify Any Aspect of the Application

As stated above, 10 C.F.R. § 2.714(a) requires that the Petition set forth the specific aspect of the subject matter of the proceeding as to which Petitioner wishes to intervene. The Petition simply fails to do so. As the Petition identifies no aspect of the application as to which Petitioner wishes to intervene, it should be denied.²

CONCLUSION

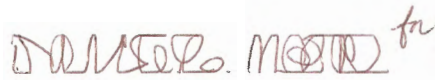
Because proceedings on license renewal applications under Part 54 are of limited scope, proximity to the facility should be considered as just one factor in determining whether a petitioner has standing to intervene. Under this standard, the Petitioner has failed to establish its standing to intervene in this proceeding, nor has it established the standing of the individuals it represents, insofar

¹ Of course, should Petitioner establish standing in an amendment to the Petition, the Commission's regulations in 10 C.F.R. § 2.714(b)(2) would still require Petitioner to submit a contention meeting the standards in that section in order to be granted leave to intervene in this proceeding.

² The Petitioner repeatedly asserts an "unlimited right to amend" the Petition. Petition at 3-5. While 10 C.F.R. § 2.714(a)(3) permits amendment of the Petition, Petitioner must make a good-faith effort to address the requirements of 10 C.F.R. § 2.714, and has not done so.

as the Petition does not show an injury-in-fact to those individuals' interests. The Petitioner has also failed to set forth any aspect of the renewal application with respect to which it wishes to intervene. Therefore, the Petition, unless appropriately amended and supplemented, should be denied.

Respectfully submitted,



Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of August, 1998

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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RULE
ADJUDICATORY

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE NATIONAL WHISTLEBLOWER CENTER'S REQUEST FOR A HEARING AND PETITION TO INTERVENE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, as indicated by asterisk or through deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail as indicated, this 27th day of August, 1998:

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